172

(2)

No. 10-293

Supreme Court, U.S.
FILED
SEP 29 2010
OFFICE OF THE CLERK

In The
Supreme Court of the United States

ARTEMIO MARCOS ABAD, Individually and as Trustee of the Artemio M. Abad Revocable Trust; GLORIA PASCUA ABAD, Individually and as Trustee of the Gloria P. Abad Revocable Trust,

Petitioners,

vs.

FINANCE FACTORS, LIMITED; CENTRAL PACIFIC BANK, Successor-In-Interest to City Bank; DIRECTOR OF BUDGET AND FISCAL SERVICES, City and County of Honolulu; AMERICAN GENERAL FINANCE, INC.; ERLINDA GONZALES and WILSON U. PASCUA, Individually and doing business as Honland Realty,

Respondents.

On Petition For Writ Of Certiorari To The Intermediate Court Of Appeals Of Hawaii

CENTRAL PACIFIC BANK'S, SUCCESSOR-IN-INTEREST TO CITY BANK, OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MITZI A. LEE
Counsel of Record

LAW OFFICE OF MITZI LEE
212 Merchant Street, Suite 227
Honolulu, Hawaii 96813
Telephone: 808-275-0200
Facsimile: 808-275-0222
e-mail: mitzi.lee@hawaiiantel.net
Attorney for Respondent
Central Pacific Bank, Successor-In-Interest to City Bank

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

The Question Presented should be:

> Did the Hawaii State Courts violate the Due Process Clause of the United States Constitution by granting foreclosure summary judgments against the real properties owned by a husband and wife based upon a United States Bankruptcy Court's In Rem Orders in the wife's bankruptcy case where the United States Bankruptcy Court specifically noted in the In Rem Orders that "the Debtor and other persons who claim an interest in the Property have not acted in good faith to reorganize or seek discharge of their debts under the Bankruptcy Code but, rather have used the filing of a bankruptcy case as an obstruction to a lender's efforts to foreclose on mortgaged property?"

TABLE OF CONTENTS

		Page
Question Presented		i
Table of Authorities		iv
I.	Statement Of The Case	1
II.	Reasons For Denying The Writ Of Certiorari	2
	A. *In Rem* Orders Are Not A Violation Of Due Process	3
	B. Actions Of A Debtor And A Debtor's Husband Can Be Imputed To Each Other	6
	C. Notice Of The In Rem Order Was Given To Artemio Abad's Attorney, Who Was An Agent For Artemio Abad	8
	D. Petitioners' Writ Of Certiorari Is Moot As There Were Bona Fide Purchasers Of The Subject Properties At The Foreclosure Auction	10
III.	Conclusion	12

TABLE OF CONTENTS – Continued

Page

Appendix

Appendix A: PACER Case Locator print-outs for bankruptcy cases involving Artemio M. Abad, Gloria P. Abad and Jennifer Ann Abad. App. 1

Appendix B: Order Granting Movant and Secured Creditor City Bank's Motion for Relief from the Automatic Stay Filed September 9, 2002 ..... App. 4

Appendix C: Hawaii Intermediate Court of Appeals Summary Disposition Order, Dated December 28, 2009 ..... App. 9

TABLE OF AUTHORITIES

Page

CASES

City Bank v. Saje Ventures II, 7 Haw. App. 130, 748 P.2d 812 (1988) 3, 11

In re Felberman, 196 B.R. 678 (S.D.N.Y. 1995) 2, 9, 10

In re Fernandez, 212 B.R. 361 (C.D. Cal. 1997) 2, 3, 4

In re Kinney, 51 B.R. 840 (C.D. Cal. 1985) 2, 7

In re Ouverson, 79 B.R. 830 (N.D. Iowa 1987) 2, 7, 8

In re Roben, 294 B.R. 840 (E.D. Ar. 2003) 2, 3, 4

In re Snow, 201 B.R. 968 (C.D. Cal. 1996) 5, 6

In re Yiman, 214 B.R. 463 (D.Md. 1997) 2, 3, 4, 5

Novak v. TRW, Inc., 822 F.Supp. 963 (E.D.N.Y. 1993) 2, 9

Veal v. Geraci, 23 F.3d 722 (2nd Cir. 1994) 2, 9

STATUTES

11 U.S.C. § 105 7

11 U.S.C. § 105(a) 4, 5

CENTRAL PACIFIC BANK'S, SUCCESSOR-IN-INTEREST TO CITY BANK, OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I. STATEMENT OF THE CASE

RESPONDENT CENTRAL PACIFIC BANK, Successor-In-Interest to City Bank (hereinafter "Respondent CPB"), objects to the arguments set forth by Petitioners in the Statement of Case section of the Petition for Writ of Certiorari filed on August 19, 2010 and placed on the docket on August 30, 2010. Respondent CPB does not object to the factual portion of the Statement of the Case set forth by Petitioners other than to incorporate the following which Petitioners conveniently omitted.

The following bankruptcy petitions were filed by the Plaintiffs during the foreclosure action, which was initiated by Respondent CPB in the Circuit Court of the First Circuit of the State of Hawaii:

Debtor	Case No.	Chapter	Date Filed	Date Closed
Gloria P. Abad	1:01-BK-02461	7	06/20/01	09/25/01
Artemio M. Abad	1:01-BK-03144	13	08/07/01	10/12/01
Jennifer Ann Abad	1:01-BK-03867	13	10/02/01	11/30/01
Jennifer Ann Abad	1:01-BK-04564	7	11/21/01	12/28/01
Gloria P. Abad	1:02-BK-02358	7	07/01/02	10/16/02
Artemio M. Abad	1:02-BK-03188	7	09/04/02	11/20/02[1]

[1] Said information was obtained through PACER Case Locator. A copy of the print-outs are attached as Appendix A.

II. REASONS FOR DENYING THE WRIT OF CERTIORARI

Contrary to Petitioners' argument, federal law has held that *in rem* orders in a bankruptcy proceeding which apply to property co-owned by others who are not parties to the bankruptcy proceeding are not a violation of due process where, as in the instant case, there have been serial bankruptcy filings and where the Debtor and others who claim an interest in the property have not acted in good faith under the Bankruptcy Code. *In re Roben*, 294 B.R. 840 (E.D. Ar. 2003); *In re Fernandez*, 212 B.R. 361, 371 (C.D. Cal. 1997); *In re Yiman*, 214 B.R. 463, 466-67 (D.Md. 1997). Moreover, federal law has specifically held that actions of a Debtor and her husband can be imputed to each other. *In re Ouverson*, 79 B.R. 830 (N.D. Iowa 1987); *In re Kinney*, 51 B.R. 840 (C.D. Cal. 1985). Additionally, it is undisputed that the *In Rem* Order in the instant case was provided to Artemio Abad's counsel on September 12, 2002 and the auction for the subject property did not take place until October 8, 2002. Federal law has held that an attorney is the agent for his or her client. The basic laws of agency dictate that an agent's knowledge is imputed to his or her principal. There is a presumption that an agent will relay to his or her principal any and all relevant information that he or she has acquired. *Veal v. Geraci*, 23 F.3d 722 (2nd Cir. 1994); *Novak v. TRW, Inc.*, 822 F.Supp. 963, 974 (E.D.N.Y. 1993); *In re Felberman*, 196 B.R. 678 (S.D.N.Y. 1995). Hence, Artemio Abad had ample time to challenge the *In*

Rem Order prior to the auction if he so chose, but he did not do so. Instead, the subject properties were sold to third-party bona fide purchasers rendering Petitioners' Writ of Certiorari moot as Petitioners never posted a supersedeas bond to stay the State Court's Motion for Confirmation of Sale. *City Bank v. Saje Ventures II*, 7 Haw. App. 130, 748 P.2d 812 (1988). Accordingly, Petitioners' Writ of Certiorari should be denied.

A. *In Rem* Orders Are Not A Violation Of Due Process

Federal law has held that *in rem* orders in a bankruptcy proceeding which apply to property co-owned by others who are not parties to the bankruptcy proceeding are not a violation of due process where there have been serial bankruptcy filings and where the Debtor and others who claim an interest in the property have not acted in good faith under the Bankruptcy Code. *In re Roben*, 294 B.R. 840 (E.D. Ar. 2003); *In re Fernandez*, 212 B.R. 361, 371 (C.D. Cal. 1997); *In re Yiman*, 214 B.R. 463, 466-67 (D.Md. 1997).

In *In re Roben*, 294 B.R. 840 (E.D. Ar. 2003), the Debtor and Debtor's spouse filed six bankruptcy petitions during a six year period. The Court noted that their multiple filings were evidence that they were engaged in an abuse of the bankruptcy process. *Id.* at 845. The Court found that although this particular bankruptcy was only brought by the Debtor, the Debtor and the Debtor's spouse acted in concert

to abuse the automatic stay provisions of the Bankruptcy Code and charged the Debtor's spouse with "constructive notice" of the proceeding, which did not violate his due process rights. *Id.* at 848.

The Court ruled that since the subject property was part of the bankruptcy estate, it had jurisdiction over that property sufficient to enter an *in rem* order. The Court also found that it had authority under 11 U.S.C. § 105(a) to override the need for formal service of process on the Debtor's spouse. *Id.* at 848 (citing *In re Fernandez*, 212 B.R. 361, 371 (C.D. Cal. 1997); *In re Yiman*, 214 B.R. 463, 466-67 (D.Md. 1997)).

In the case at hand, the Abad Defendants filed six bankruptcy petitions within a fifteen month period, all for the purpose of keeping the foreclosure proceeding in abeyance. The Bankruptcy Judge set forth in the Order Granting Movant And Secured Creditor City Bank's Motion For Relief From The Automatic Stay that: "IT IS FURTHER HEREBY ORDERED, ADJUDGED AND DECREED that the relief is being granted 'in rem' because the Debtor and other persons who claim an interest in the Property have not acted in good faith to reorganize or seek discharge of their debts under the Bankruptcy Code but, rather have used the filing of a bankruptcy case as an obstruction to a lender's efforts to foreclose on mortgaged property." *See* Appendix B.

Applying the *In re Roben* case, 294 B.R. 840 (E.D. Ar. 2003), to the case at hand, it is clear that Gloria Abad and Artemio Abad acted in concert to abuse the

automatic stay provisions of the Bankruptcy Code, and that Artemio Abad had constructive notice of the proceeding. As such, the *In Rem* Order did not violate Artemio Abad's due process rights.

In the Petition for Writ of Certiorari, Petitioners cite to *In re Yiman*, 214 B.R. 463 (D.Md. 1997) for the proposition that *in rem* orders can constitutionally operate only to bar "subsequent purchasers" and not previous title holders, such as a debtor's current spouse. *See* Writ of Certiorari at page 10. However, this is not what *In re Yiman*, *id.*, holds. In *In re Yiman*, *id.*, debtor and her spouse filed seven bankruptcy petitions over a five year period. Although the nondebtor spouse was not a party to the case, the Court invoked its equitable power under 11 U.S.C. § 105(a) to prevent a continued abuse of the bankruptcy code and created an equitable servitude where the filing of a new bankruptcy petition by debtor or debtor's spouse within a specified period of time would not extend the protection of the automatic stay to the subject property and would not interfere with any foreclosure proceeding then pending or thereafter filed. *Id.* at 466-467.

Moreover, in the Petition for Writ of Certiorari, Petitioners cite to *In re Snow*, 201 B.R. 968 (C.D. Cal. 1996), for the proposition that although the Court granted an *in rem* order and bound subsequent purchasers for the requested 180 day period, it prohibited the issuance of an order binding co-owners as they had not been brought before the Court. *See* Writ of Certiorari at page 10. However, the *In re Snow*

case, *id.*, is distinguishable from the case at hand. In *In re Snow*, *id.*, it appears that only two bankruptcies concerning the subject property were filed in a four year period (one by Stephen Gelff in 1992 and one by Tony Snow in 1996). Additionally, the co-owners of the property at the time of the most recent filing, Charles Smith, Tony Snow, Thomas Richards, Bill Roberts and Eastern Financial Company, do not appear to be related to each other. Contrasting this to the case at hand, Debtor and Debtor's spouse were obviously related, lived together, were represented by the same counsel, and the Court held that they abused the Bankruptcy Code due to their numerous bankruptcy filings in a short period of time. *See* Appendix B. Moreover, it should be noted that in *In re Snow*, the Court held that it was an appropriate case to grant *in rem* relief, which relief from the automatic stay runs with the property. *Id.* at 971.

Accordingly, it is clear from the federal cases that there was no due process violation by the U.S. Bankruptcy Court granting the *In Rem* Order and the Hawaii Court granting the foreclosure summary judgments in the instant case. As such, Petitioners' Writ of Certiorari should hereby be denied.

B. Actions Of A Debtor And A Debtor's Husband Can Be Imputed To Each Other

Federal law has specifically held that actions of a Debtor and her husband can be imputed to each other due to their unity of interest and concert of action.

Under such circumstances, orders binding one family member should bind the other family members as well. *In re Ouverson*, 79 B.R. 830 (N.D. Iowa 1987); *In re Kinney*, 51 B.R. 840 (C.D. Cal. 1985). Pursuant to 11 U.S.C. § 105, the Court is able to bind parties not before it due to this unity of interest and concert of action. *In re Kinney*, 51 B.R. 840 (C.D. Cal. 1985). Accordingly, Artemio Abad's due process rights have not been violated, and Petitioners' Writ of Certiorari should be denied.

In *In re Kinney*, *id.*, eight of ten bankruptcies were filed by ten different family members of the Kinney family in order to obtain the automatic stay as to the subject property. The Court held that their concerted, intertwined efforts to prevent a lender from realizing on its security could be viewed as the acts of one entity, with many individuals carrying out these acts. *Id.* at 845. The Court ruled that the actions of each family member can be imputed to the rest of the family due to the unity of interest and concert of action. *Id.* The Court made an analogy to a criminal conspiracy where each family member would be liable for the acts of the others in furtherance of this scheme stating that in the presence of such a scheme the individuality of each of the debtors is blurred, revealing one common entity with five operatives. *Id.* at 845-846. This case held that orders binding one family member should bind other family members as well. The Court also ruled that it had the power to bind parties not before the Court pursuant to 11 U.S.C. § 105. *Id.* at 846.

Similarly, in *In re Ouverson*, 79 B.R. 830 (N.D. Iowa 1987), the Court held that there was no question that four of the seven bankruptcy filings were filed by Debtor and/or her husband in order to invoke an automatic stay as to the subject property encumbered by a mortgage. The Court ruled that the Debtor and the Debtor's husband's concerted, intertwined acts to prevent the foreclosure could be viewed as the acts of one entity. *Id.* at 833. The Court found that the actions of the Debtor and her husband could be imputed to each other because of their unity of interest in preventing the foreclosure and their concert of action. *Id.*

Hence, Debtor Gloria Abad's actions are imputed to Artemio Abad due to their unity of interest in preventing the foreclosure of the subject properties and their concert of action, where together they filed four foreclosures in fifteen months and they, along with another family member, filed six foreclosures in fifteen months. As such, Artemio Abad was not denied due process by the Court's granting of the *In Rem* Order in his wife's bankruptcy case, and Petitioner's Writ of Certiorari should be denied.

C. Notice Of The In Rem Order Was Given To Artemio Abad's Attorney, Who Was An Agent For Artemio Abad

It is undisputed that the *In Rem* Order was provided to Artemio Abad's counsel on September 12, 2002 and the auction for the subject property did not

take place until October 8, 2002. Federal law has held that an attorney is the agent for his or her client. Hence, Artemio Abad had ample time to challenge the *In Rem* Order prior to the auction if he so chose, but he did not do so.

A relationship between an attorney and a client he or she represents is one of agent and principal. *Veal v. Geraci*, 23 F.3d 722 (2nd Cir. 1994). The basic laws of agency dictate that an agent's knowledge is imputed to his or her principal. There is a presumption that an agent will relay to his or her principal any and all relevant information that he or she has acquired. *Novak v. TRW, Inc.*, 822 F.Supp. 963, 974 (E.D.N.Y. 1993).

In *In re Felberman*, 196 B.R. 678 (S.D.N.Y. 1995), the Court held that knowledge of an order possessed by Debtor's attorney, by virtue of his prior representation of Debtor's husband, could be imputed to Debtor. In the *Felberman* case, the Court entered an Order on October 17, 1994, in Aaron Felberman's bankruptcy case providing that any future bankruptcy filing by Aaron Felberman or his wife would not result in an automatic stay as to a specific creditor absent a specific order from the Court. *Id.* at 683. A foreclosure auction was scheduled by the creditor for January 10, 1995. Mrs. Felberman filed a bankruptcy petition on January 9, 1995. Mrs. Felberman could have made a motion challenging the validity of the Order or she could have applied for an Order requesting a stay as allowed in the October 17, 1994 Order; however, she did not do so. The Court ruled

that Mrs. Felberman was not denied her due process rights, she simply chose not to exercise them. *Id.* The Court ruled that most likely Mrs. Felberman learned of the October 17, 1994 Order from her husband but, even if she didn't, there was no question that her attorney knew of the October 17, 1994 Order. *Id.* at 684. The Court held that given the attorney-client relationship, the attorney's knowledge must be imputed to his client. *Id.* at 684-685.

Similarly, in the case at hand, it is undisputed that the *In Rem* Order was provided to Artemio Abad's counsel on September 12, 2002 and the auction for the subject properties did not take place until October 8, 2002. Hence, Artemio Abad could have filed a motion with the bankruptcy court disputing the *In Rem* Order on due process grounds or he could have filed a temporary restraining order preventing the auction from taking place but he failed to do so. As such, like Mrs. Felberman, Artemio Abad had notice of the *In Rem* Order and was not denied his due process rights; he simply chose not to exercise them. Accordingly, Petitioners' Writ of Certiorari should be denied.

D. Petitioners' Writ Of Certiorari Is Moot As There Were Bona Fide Purchasers Of The Subject Properties At The Foreclosure Auction

It is well settled law that a case is moot if the reviewing court can no longer grant effective relief.

City Bank v. Saje Ventures II, 7 Haw. App. 130, 134, 748 P.2d 812, 815 (1988). The general rule is that the right of a good faith purchaser to receive property acquired at a judicial foreclosure sale cannot be affected by the reversal of an order confirming sale where a supersedeas bond has not been filed. *Id.* at 133, 748 P.2d at 814. In the case at hand, no supersedeas bond was filed. Hence, the U.S. Supreme Court can no longer grant effective relief and this matter is moot.

In *Saje Ventures II*, *id.* at 132, 748 P.2d at 814, the Commissioner held a foreclosure auction. There were two bids, of which a third party purchaser's bid was the highest. The lender moved to confirm the sale. The Saje Defendants opposed the confirmation; however, the motion for confirmation was granted. *Id.* at 132, 748 P.2d at 814. The Saje Defendants filed a motion for reconsideration, which was denied. *Id.* at 133, 748 P.2d at 814. The Saje Defendants then filed a timely appeal. The Hawaii Intermediate Court of Appeals denied the appeal ruling that the Saje Defendants did not file a supersedeas bond to stay the enforcement of the Confirmation Order. The Hawaii Intermediate Court of Appeals held that even if they were to reverse the Confirmation Order, the closed sale of the subject property to the third party purchaser could not be vitiated and they could not direct a new sale of the subject property. *Id.* at 134, 748 P.2d at 815. Hence, the Hawaii Intermediate Court of Appeals held that the matter was moot and dismissed the appeal. *Id.* at 134, 748 P.2d at 815.

In the case at hand, the *In Rem* Order was entered on September 9, 2002. *See* Appendix B. The subject properties (i.e., the Salt Lake property and the Pearl City Property) were sold at a foreclosure auction on October 8, 2002 to third-party bona fide purchasers. On February 12, 2003, the Court entered an Order Confirming the Sale of the Subject Properties. The Petitioners filed an appeal and the Hawaii Intermediate Court of Appeals dismissed the appeal by issuing a Summary Disposition Order on December 28, 2009 concluding that the appeal was moot because Petitioners had not posted a supersedeas bond to stay the State Court's order confirming the foreclosure sales. *See* Appendix C.

As such, Petitioners' Writ of Certiorari should be dismissed as it is moot.

III. CONCLUSION

As set forth herein, federal law has held that *in rem* orders in a bankruptcy proceeding which apply to property co-owned by others who are not parties to the bankruptcy proceeding are not a violation of due process where, as in the instant case, there have been serial bankruptcy filings and where the Debtor and others who claim an interest in the property have not acted in good faith under the Bankruptcy Code. Moreover, federal law has specifically held that actions of a Debtor and her husband can be imputed to each other. Additionally, it is undisputed that the *In Rem* Order was provided to Artemio Abad's

attorney, Gary Dubin, Esq., on September 12, 2002 and the auction for the subject property did not take place until October 8, 2002. Federal law has held that an attorney is the agent for his client. The basic laws of agency dictate that an agent's knowledge is imputed to his principal. There is a presumption that an agent will relay to his principal any and all relevant information that he has acquired. Hence, Artemio Abad had ample time to challenge the *In Rem* Order prior to the auction if he so chose, but he did not do so. Instead, the subject properties were sold to third-party bona fide purchasers rendering Petitioners' Writ of Certiorari moot as Petitioners never posted a supersedeas bond to stay the State Court's Motion for Confirmation of Sale. Accordingly, Petitioners' Writ of Certiorari should respectfully be denied.

Respectfully submitted,

MITZI A. LEE
Counsel of Record
Attorney for Respondent
Central Pacific Bank,
Successor-In-Interest to City Bank

Honolulu, Hawaii
September 29, 2010

[LOGO] **PACER**
Case Locator

All Court Types Party Search
Thu Sep 23 19:58:15 2010
2 records founds

User: cl2071
Client:
Search: All Court Types Party Search Name Abad, Gloria P. All Courts Page: 1

Bankruptcy Results

	Party Name ▼	Court	Case	Ch	Date Filed	Date Closed	Disposition
1.	Abad, Gloria P. (db)	hibke	1:01-bk-02461	7	06/20/2001	09/25/2001	Dismissed for Other Reason
2.	Abad, Gloria P. (db)	hibke	1:01-bk-02358	7	07/01/2002	10/16/2002	Standard Discharge 10/16/2002

Receipt 09/23/2010 19:58:16 9597758

User cl2071
Client
Description All Court Types Party Search
Name Abad, Gloria P. All Courts Page: 1
Pages 1 ($0.08)

[LOGO] **PACER**
Case Locator

All Court Types Party Search
Thu Sep 23 19:59:00 2010
2 records founds

User: cl2071
Client:
Search: All Court Types Party Search Name Abad, Jennifer All Courts Page: 1

Bankruptcy Results

	Party Name ▼	Court	Case	Ch	Date Filed	Date Closed	Disposition
1.	Abad, Jennifer Ann (db)	hibke	1:01-bk-03867	13	10/02/2001	11/30/2001	Dismissed for Other Reason
2.	Abad, Jennifer Ann P. (db)	hibke	1:01-bk-04564	7	11/21/2001	12/28/2001	Dismissed for Other Reason

Receipt 09/23/2010 19:59:01 9597774

User cl2071
Client
Description All Court Types Party Search
Name Abad, Jennifer All Courts Page: 1
Pages 1 ($0.08)

APPENDIX B

Of Counsel:
HISAKA STONE GOTO
YOSHIDA COSGROVE & CHING

MITZI A. LEE 6059-0
Pacific Guardian Center, Mauka Tower
737 Bishop Street, Suite 3000
Honolulu, Hawaii 96813
Telephone No.: 523-0451

Attorney for Movant and
Secured Creditor CITY BANK

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF HAWAII

In re GLORIA P. ABAD, Debtor.	Case No. 02-02358 (Chapter 7) ORDER GRANTING MOVANT AND SECURED CREDITOR CITY BANK'S MOTION FOR RELIEF FROM THE AUTOMATIC STAY; EXHIBIT "A" Hearing Date: August 21, 2002 Time: 1:30 p.m. Judge: The Honorable Robert J. Faris

ORDER GRANTING MOVANT AND SECURED CREDITOR CITY BANK'S MOTION FOR RELIEF FROM THE AUTOMATIC STAY

Movant and Secured Creditor CITY BANK filed its Motion for Relief from the Automatic Stay (hereinafter "Motion") herein on July 19, 2002. The Motion came on for hearing on August 14, 2002 at 1:30 p.m. and was continued to August 21, 2002 at 1:30 p.m. At the continued hearing, Peter Aduja, Esq. appeared on behalf of Debtor Gloria P. Abad and Mitzi A. Lee, Esq. appeared on behalf of City Bank.

The Court has heard the arguments of counsel and has carefully considered the Motion, the Notice of Hearing, the Memorandum in Support of the Motion, the Declaration of Ed Castro, the Declaration of Mitzi A. Lee, Debtor Gloria Abad's Opposition and all other relevant documents contained in the file herein, and based upon such consideration, it is hereby ORDERED THAT:

The aforesaid Motion is granted, and the automatic stay of 11 U.S.C. 362(a) as imposed against City Bank with respect to the Debtor, Debtor's Estate, and that certain real property located at 3345 Ala Akulikuli Street, Honolulu, Hawaii 96818 (hereinafter "Property"), of which a copy of the description of the Property is attached hereto as Exhibit "A", and made a part hereof, is terminated as of September 4, 2002; and

Further, that as of September 4, 2002, City Bank, its attorneys, its agents, any foreclosure commissioner or successor commissioner can proceed to exercise any and all of their rights and remedies with respect to the Property, including but not limited to, foreclosure of City Bank's Mortgage against the Property and recovery of possession of said Property.

IT IS FURTHER HEREBY ORDERED, ADJUDGED AND DECREED that the relief is being granted "in rem" because the Debtor and other persons who claim an interest in the Propeorty [sic] have not acted in good faith to reorganize or seek discharge of their debts under the Bankruptcy Code but, rather have used the filing of a bankruptcy case as an obstruction to a lender's efforts to foreclose on mortgaged property. As used herein, "in rem" relief means that the relief from stay is granted not only personally against the Debtor but with respect to the Property; and shall be deemed binding and of full force and effect in any subsequent bankruptcy case, whether commenced by a debtor in this case or any another [sic] individual or entity claiming an interest in the Property. This in rem relief shall be effective only until the earlier of (i) 240 days after the date of entry of this order, or (ii) the recovery of possession by a purchaser at a judicial or non-judicial sale upon foreclosure of the subject mortgage.

It is hereby ordered that City Bank may not obtain a deficiency judgment without further order of this Court.

DATED: Honolulu, Hawaii, **SEP 0 9 2002**

/s/ Robert J. Faris
UNITED STATES
BANKRUPTCY COURT

In re Gloria P. Abad, Case No. 02-02358; ORDER GRANTING MOVANT AND SECURED CREDITOR CITY BANK'S MOTION FOR RELIEF FROM THE AUTOMATIC STAY

TMK: (1) 1-1-053-032

EXHIBIT "A"

Title Guaranty of Hawaii, Inc.
HONOLULU, HAWAII

All of that certain parcel of land situate at Moanalua, Honolulu, City and County of Honolulu, State of Hawaii, described as follows:

LOT 2200, area 9,012 square feet, more or less, as shown on Map 315, filed in the Office of the Assistant Registrar of the Land Court of the State of Hawaii with Land Court Application No. 1074 of the Trustees under the Will and of the Estate of Samuel M. Damon, deceased;

Being land(s) described in Transfer Certificate of Title No. 505,278 issued to ARTEMIO MARCOS ABAD, as Trustee under that certain unrecorded Artemio M. Abad Revocable Trust dated February 25, 1994, as to

an undivided 1/2 interest, and GLORIA PASCUA ABAD, as Trustee under that certain unrecorded Gloria P. Abad Revocable Trust dated February 25, 1994, as to an undivided 1/2 interest.

BEING THE PREMISES ACQUIRED BY DEED

GRANTOR:	ARTEMIO MARCOS ABAD and GLORIA PASCUA ABAD, husband and wife
GRANTEE:	ARTEMIO MARCOS ABAD, as Trustee under that certain unrecorded Artemio M. Abad Revocable Trust dated February 25, 1994, as to an undivided 1/2 interest, and GLORIA PASCUA ABAD, as Trustee of the Gloria P. Abad Revocable Trust, dated February 25, 1994, as to an undivided 1/2 interest, as Tenants in Common
DATED:	February 25, 1994
FILED:	Land Court Document No. 2437990
RECORDED:	Document No. 98-019075

APPENDIX C

NOT FOR PUBLICATION IN WEST'S HAWAI'I REPORTS AND PACIFIC REPORTER

NO. 27953

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

CITY BANK, Plaintiff/Counterclaim-Defendant/Appellee, v. ARTEMIO MARCOS ABAD, INDIVIDUALLY AND AS TRUSTEE OF THE ARTEMIO M. ABAD REVOCABLE TRUST; GLORIA PASCUA ABAD, INDIVIDUALLY AND AS TRUSTEE OF THE GLORIA P. ABAD REVOCABLE TRUST; JENNIFER ABAD, Defendants/Cross-Claim Defendants/Appellants, and FINANCE FACTORS, LIMITED, Defendant/Crossclaimant/Counterclaimant/Appellee; DIRECTOR OF BUDGET AND FISCAL SERVICES, CITY AND COUNTY OF HONOLULU, Defendants/Cross-Claim Defendants/Appellees; and FELIX PASCUA; JOHN DOES 1-50; JANE DOES 1-50; DOE PARTNERSHIPS 1-50; DOE CORPORATIONS, DOE "NON-PROFIT" CORPORATIONS 1-10, and DOE GOVERNMENTAL UNITS 1-50, Defendants; and FINANCE FACTORS, LIMITED, Third-Party Plaintiff-Appellee, v. AMERICAN GENERAL FINANCE, INC., Third-Party Defendant-Appellee, and ERLINDA GONZALES and WILSON U. PASCUA, individually and doing business as HONLAND REALTY, Third-Party Defendants

APPEAL FROM THE CIRCUIT
COURT OF THE FIRST CIRCUIT
(Civ. No. 01-1-0995)

SUMMARY DISPOSITION ORDER
(By: Foley, Presiding Judge, Fujise and Leonard, JJ.)

(Filed Dec. 28, 2009)

In this appeal from a post-judgment proceeding in a foreclosure lawsuit, Defendants/Cross-Claim Defendants/Appellants Artemio Marcos Abad, Gloria Pascua Abad and Jennifer Abad (the Abad Defendants) appeal from the April 25, 2006 "Order Denying the Abad Defendants' Rule 60(b)(4) Motion to Set Aside: (1) Findings of Fact, Conclusions of Law and Order Granting Defendant and Third-Party Plaintiff Finance Factors, Limited's Motion for Default Judgment Against Defendants Artemio Marcos Abad, Individually and as Trustee of the Artemio M. Abad Revocable Trust, Gloria P. Abad, Individually and as Trustee of the Gloria Pascua Abad Revocable Trust, Jennifer Abad and Felix Pascua and Summary Judgment as to All Other Parties and for Interlocutory Decree of Foreclosure as to All Claims and All Parties Filed on May 24, 2001, Filed on March 4, 2002,[1] [ ] (2) Findings of Fact, Conclusions of Law and Order Granting Plaintiff's Motion for Summary Judgment on All Claims and Against All Parties,

---

[1] Hereinafter referred to as the "March 4, 2002 Foreclosure Order."

Interlocutory Decree of Foreclosure and Order of Sale, Filed February 6, 2002,[2] and (3) All Subsequent Orders, Judgments, Commissioner's Deeds, Title Transfers, and Writs in this Action Entered Pursuant Thereto" (the April 25, 2006 Post-Judgment Order) entered by the Circuit Court of the First Circuit (circuit court).[3]

The Abad Defendants argue on appeal that the circuit court erred

> in denying [Hawai'i Rules of Civil Procedure (HRCP)] Rule 60(b)(4) relief as it originally lacked jurisdiction, pursuant [to] the automatic stay provisions of Section 362 of Tile [sic] 11 of the United States Code and the decision of the Intermediate Court of Appeals held in Island Insurance Co., Inc. v. Santos, 86 [Hawai'i] 363, 949 P.2d 203 (App. 1997), to auction the subject properties and to confirm the subject foreclosure sales.

BACKGROUND

In order to purchase real estate in Pearl City[4] (the Pearl City Property) and Salt Lake[5] (the Salt

---

[2] This order was filed on June 20, 2002 and is hereinafter referred to as "the June 20, 2002 Foreclosure Order."

[3] The Honorable Karen N. Blondin presided.

[4] This property is located at 98-1457 Ho'omahie Loop, Pearl City, Hawai'i.

[5] This property is located at 3345 'Ala Akulikuli Street, Honolulu, Hawai'i.

Lake Property), the Abad Defendants obtained loans from City Bank, Defendant/Crossclaimant/Counterclaimant/Third-Party Plaintiff/Appellee Finance Factors, Limited (Finance Factors), and Third-Party Defendant/Appellee American General Finance, Inc. (American General). The Abad Defendants mortgaged the Pearl City Property and the Salt Lake Property to Finance Factors. The Abad Defendants additionally mortgaged the Salt Lake Property to City Bank. The Abad Defendants additionally mortgaged the Pearl City Property to American General. The Abad Defendants eventually defaulted on some of the loans.

City Bank filed a complaint to foreclose on the Salt Lake Property against the Abad Defendants, Finance Factors, Defendants/Cross-Claim Defendants/Appellees the Director of Budget and Fiscal Services of the City and County of Honolulu (the City) and Felix Pascua.

Finance Factors asserted a counterclaim for foreclosure against City Bank and a cross-claim for foreclosure against the Abad Defendants, the City, and Felix Pascua. Finance Factors also asserted a third-party complaint for foreclosure against American General, and Third-Party Defendants Erlinda Gonzales (Gonzales) and Wilson U. Pascua doing business as Honland Realty (Wilson Pascua).

Thereafter, the following events occurred:

- The circuit court entered the March 4, 2002 Foreclosure Order, granting Finance Factors's motion for default judgment against the Abad

Defendants and Felix Pascua, and summary judgment against all other parties on Finance Factors's counterclaim, Finance Factors's cross-claims, and Finance Factors's third-party claims.

- On March 4, 2002, the circuit court entered an HRCP Rule 54(b) certified judgment of foreclosure in favor of Finance Factors and (a) against City Bank on Finance Factors's counterclaim, (b) against the Abad Defendants, the City, and Felix Pascua on Finance Factors's cross-claim, and (c) against American General, Gonzales, and Felix Pascua on Finance Factors's third-party complaint.

- The circuit court entered the June 20, 2002 Foreclosure Order granting City Bank's motion for summary judgment against the Abad Defendants, Finance Factors, the City and Felix Pascua on City Bank's complaint for foreclosure.

- On June 20, 2002, the circuit court entered an HRCP 54(b) certified judgment of foreclosure in favor of City Bank and against the Abad Defendants, Finance Factors, the City, and Felix Pascua as to City Bank's complaint for foreclosure.

- On August 8, 2002, the United States Bankruptcy Court for the District of Hawai'i (Bankruptcy Court) granted Finance Factors's unopposed motion for relief from the automatic stay caused by the filing of Gloria Abad's bankruptcy petition. This relief from the stay was granted "'in rem' because the Debtor and other persons who claim an interest in the Property have not acted in good faith to reorganize or seek discharge of their debts. . . . As used herein, 'in rem' relief means

that the relief from stay is granted not only personally against the Debtor but with respect to the subject property."[6] Notice of this order was served on the Abad Defendants' attorney on August 19, 2002.

- After a motion and hearing, the Bankruptcy Court granted City Bank relief from the automatic stay created by Gloria Abad's petition for bankruptcy. This September 9, 2002 order was also granted "in rem" but applied to the Salt Lake Property only. Notice of this order was served on the Abad Defendants' attorney on September 13, 2002.

- On October 8, 2002, the foreclosure auction for the Salt Lake Property and the Pearl City Property occurred.

- On November 14, 2002, Gloria Pascua Abad filed a notice of appeal from the June 20, 2002 Foreclosure Order, which the supreme court clerk docketed as supreme court case number 25474.

- On November 14, 2002, the Abad Defendants moved the circuit court to set aside the March 4, 2002 Foreclosure Order pursuant to HRCP 60(b), arguing that the circuit court lacked subject matter jurisdiction based on their claim that the mortgage loan was void as it was made with an unlicensed mortgage broker.

---

[6] The "subject property" included both the Pearl City Property and the Salt Lake Property.

- On December 24, 2002, the circuit court denied the Abad Defendants' HRCP 60(b) motion to set aside the March 4, 2002 Foreclosure Order.

- On January 15, 2003, the Abad Defendants filed a notice of appeal from the December 24, 2002 order denying the Abad Defendants' HRCP 60(b) motion to set aside the March 4, 2002 Foreclosure Order, which the supreme court clerk docketed as supreme court case number 25587.

- On February 12, 2003, the circuit court entered an order and HRCP Rule 52(b) – certified judgment confirming the sales of the Salt Lake Property[7] and the Pearl City Property[8] to third-party purchasers and directing the distribution of the sales proceeds.

- On March 14, 2003, the Abad Defendants filed a notice of appeal from the February 12, 2003 order and the February 12, 2003 HRCP 54(b) judgment, which the supreme court clerk docketed as supreme court case number 25693.

- On January 12, 2005, we issued a published opinion on the consolidated appeals of supreme court case numbers 25474, 25587, and 25693 that

---

[7] On May 9, 2003, the circuit court extended the time to close the sale of the Salt Lake Property for one day, or March 20, 2003, to conform with the actual date of closing on the Salt Lake Property.

[8] On April 11, 2003, the circuit court extended the time to close the sale of the Pearl City Property to ten days after the date of the order, or April 21, 2003. A writ of possession for the Pearl City Property was issued by the circuit court on May 6, 2003.

dismissed parts of the appeal and affirmed the orders that were the subject of the remaining parts of the appeal. *City Bank v. Abad*, 106 Hawai'i 406, 105 P.3d 1212 (App. 2005) (*Abad I*). In this opinion, we

- Dismissed the appeal in number 25474 as untimely,
- Dismissed the appeal in number 25693 as untimely in part and premature in part, and
- In number 25587, dismissed the appeal from the circuit court's November 14, 2002 oral confirmation of the foreclosure sales and affirmed the December 24, 2002 order denying the Abad Defendants' November 14, 2002 HRCP Rule 60(b) motion.
- In so doing, we ruled that the Abad Defendants had not shown the Bankruptcy Court's "in rem" orders lifting the automatic bankruptcy stay as to Finance Factors and City Bank were invalid, either because the Bankruptcy Court "lacked jurisdiction of the parties or otherwise acted in a manner inconsistent with due process of law." *Abad I*, 106 Hawai'i at 411, P.3d at 1217.

- Central Pacific Bank became City Bank's successor-in-interest in this case as the result of a corporate merger between Central Pacific Bank and City Bank.

On February 21, 2006, the Abad Defendants again moved the circuit court pursuant to HRCP Rule 60(b) to set aside (1) the March 4, 2002 Foreclosure

Order, (2) the June 20, 2002 Foreclosure Order, and (3) all subsequent orders and judgments that the circuit court entered pursuant thereto. The circuit court denied this motion by way of its April 25, 2006 Post-Judgment Order. On May 24, 2006, the Abad Defendants filed a notice of appeal from the April 25, 2006 Post-Judgment order.

JURISDICTION

Before we consider the merits of this appeal, we must decide whether we have jurisdiction to consider this matter. "An appellate court has . . . an independent obligation to ensure jurisdiction over each case and to dismiss the appeal sua sponte if a jurisdictional defect exits [sic]." *State v. Graybeard*, 93 Hawai'i 513, 516, 6 P.3d 385, 388 (App. 2000).

This is an appeal from a post-judgment order. Hawaii Revised Statutes (HRS) § 641-1(a) (Supp. 2005) authorizes appeals from final judgments, orders or decrees. "A post-judgment order is an appealable final order under HRS § 641-1(a) if the order ends the proceedings, leaving nothing further to be accomplished." *Ditto v. McCurdy*, 103 Hawai'i 153, 157, 80 P.3d 974, 978 (2003). Although, for the purpose of appealability, a separate judgment is usually necessary under HRCP Rule 58 and the holding in *Jenkins v. Cades Scutte Fleming & Wright*, 76 Hawai'i 115, 119, 869 P.2d 1334, 1338 (1994), "the separate judgment requirement articulated in *Jenkins* is inapposite in the post-judgment context." *Ditto*, 103

Hawai'i at 158, 80 P.3d at 979. Accordingly, we initially appear to have jurisdiction over this appeal pursuant to HRS § 641-1(a).

However,

> A case is moot if it has lost its character as a present, live controversy of the kind that must exist if courts are to avoid advisory opinions on abstract propositions of law. The rule is one of the prudential rules of judicial self-governance founded in concern about the proper – and properly limited – role of the courts in a democratic society. We have said the suit must remain alive throughout the course of litigation to the moment of final appellate disposition to escape the mootness bar. . . . Simply put, a case is moot if the reviewing court can no longer grant effective relief.

Kaho'ohanohano v. State, 114 Hawai'i 302, 332, 162 P.3d 696, 726 (2007) (emphasis removed, citations, internal quotation marks, and brackets omitted, and format altered).

Thus, for example, in an appeal from a foreclosure case, the defendants' failure to stay the effect of an order confirming a foreclosure sale of property to a third-party, which apparently was a good faith purchaser, rendered moot the defendants' appeal from the order confirming the sale. *City Bank v. Saje Ventures II*, 7 Haw. App. 130, 132, 748 P.2d 812, 814 (1988). In support of the decision, we relied on the general rule that "the right of a good faith purchaser

to receive property acquired at a judicial sale cannot be affected by the reversal of an order ratifying the sale where a supersedeas bond has not been filed." *Id.* at 133, 748 P.2d at 814 (internal quotation marks and citation omitted).

> Since the Saje Defendants did not stay the effect of the confirmation order and since there has been a closing of the sale of the Property to Outrigger which cannot be undone under the facts and the law, we cannot grant the relief sought by the Saje Defendants. Therefore, the appeal is moot and must be dismissed.

Id. at 132, 748 P.2d at 814.

In the instant case, the Abad Defendants did not file a supersedeas bond and obtain a court order staying the February 12, 2003 judgment confirming the foreclosure sales. Like the debtor in *City Bank v. Saje Ventures II*, the Abad Defendants ask this court to reverse the April 25, 2006 Post-Judgment Order, although they did not file a supersedeas bond and obtain a court order staying the February 6, 2003 order and judgment confirming the foreclosure sale.

Granted, "[a]n exception to the rule is where the reversal is based on jurisdictional grounds[,]" and the Abad Defendants are arguing that the circuit court lacked jurisdiction to enter the February 12, 2003 order and judgment confirming the foreclosure sale. Nevertheless, an examination of the Abad Defendant's prior appeal and our decision in *Abad I*, shows

that the Abad Defendants were raising the same jurisdiction argument that was rejected by this court in *Abad I*. In *Abad I*, this court held that the Abad Defendants failed to carry their burden on appeal, that is to say, did not show that the Bankruptcy Court's order lifting its stay over the properties in question was invalid and thus rejected the Abad Defendants' argument that the circuit court lacked jurisdiction to confirm the sales of the properties in this case.

It is true that the Supreme Court of Hawai'i has explicitly recognized three exceptions to the mootness doctrine:

> (1) the "capable of repetition, yet evading review" exception (the CRER exception);
>
> (2) the public interest exception; and
>
> (3) the collateral consequences exception.

Hamilton Ex Rel Lethem v. Lethem, 119 Hawai'i 1, 5-10, 193 P.3d 839, 843-48 (2008). However, none of these three exceptions applies to the instant case.

With regard to the CRER exception,

> [t]he phrase, "capable of repetition, yet evading review," means that a court will not dismiss a case on the grounds of mootness where a challenged governmental action would evade full review because the passage of time would prevent any single plaintiff from remaining subject to the restriction

> complained of for the period necessary to complete the lawsuit.

Lethem, 119 Hawai'i at 5, 193 P.3d at 843 (citation and some internal quotation marks omitted). The CRER exception to the mootness doctrine does not appear to apply to the instant case because the instant case would not evade review but for the fact that the Abad Defendants chose not to file a supersedeas bond. Therefore, the CRER exception to the mootness doctrine does not apply to the instant case.

With regard to the public interest exception, the Supreme Court of Hawai'i has explained that, "[w]hen analyzing the public interest exception, this court looks to (1) the public or private nature of the question presented, (2) the desirability of an authoritative determination for future guidance of public officers, and (3) the likelihood of future recurrence of the question." *Lethem*, 119 Hawai'i at 6-7, 193 P.3d at 844-45 (citation, internal quotation marks, and brackets omitted). The public interest exception to the mootness doctrine does not appear to apply to the instant case because (1) a foreclosure case arises out of a private contract between parties that does not involve the government, and, thus, a foreclosure is more of a dispute of a private nature rather than a public nature, (2) an authoritative determination for future guidance already exists within the holding in *Saje Ventures II*, 7 Haw. App. at 132, 748 P.2d at 814, and (3) the questions within the instant case will recur only when parties choose not to file a

supersedeas bond to stay the circuit court's ruling pending appeal. Therefore, the public interest exception to the mootness doctrine does not appear to apply to the instant case.

With regard to the collateral consequences exception, the Supreme Court of Hawai'i has "adopted the collateral consequences exception to the mootness doctrine in cases involving domestic violence TROs where there is a reasonable possibility that prejudicial collateral consequences will occur as a result of the entry of the TRO." *Lethem*, 119 Hawai'i at 9-10, 193 P.3d at 847-48 (internal quotation marks omitted). The collateral consequences exception to the mootness doctrine does not apply to the instant case because the instant case does not involve domestic violence or a temporary restraining order. Furthermore, the Abad Defendants could have avoided any prejudicial collateral consequences if they filed a supersedeas bond to stay the circuit court's ruling pending this appeal. Therefore, the collateral consequences exception to the mootness doctrine does not apply to the instant case.

Our disposition makes it unnecessary to reach the Abad Defendants' other arguments on appeal.

CONCLUSION

Therefore, this appeal from the April 25, 2006 Post-Judgment Order of the Circuit Court of the First Circuit is hereby dismissed.

DATED: Honolulu, Hawai'i, December 28, 2009.

On the briefs:

Gary V. Dubin,
for Defendants/Cross-Claim
Defendants/Appellants.

/s/ Daniel R. Foley
Presiding Judge

Donald K.O. Wong
Paul B.K. Wong
Kara M.L. Young
(McCorriston Miller Mukai
MacKinnon),
for Defendant/Cross-
claimant/Counterclaimant/
Third-Party Plaintiff/Appellee
Finance Factors, Limited.

/s/ Alexa D.M. Fujise
Associate Judge

/s/ Katherine G. Leonard
Associate Judge

Mitzi A. Lee
(Ching & Lee),
for Plaintiff/Counterclaim-
Defendant/Appellee Central
Pacific Bank, Successor by
Merger to City Bank.